91-828

No. _____

In the

Supreme Court of the United States

October Term, 1991

DON VANDENBERG,

Petitioner,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA and VICTOR KIMURA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA SIXTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In petitioner's action for defamation the state court below ordered summary judgment on the sole basis that it found respondents' statements to be opinion, not fact. Those statements, contained in a widely circulated letter to petitioner from respondent Kimura, not only label petitioner a racist but detail the factual grounds for calling him a racist. The letter included the statement that petitioner, Bursar at the University of California at Santa Cruz, impeded affirmative action. The question presented to this Court is:

> Where respondents accused petitioner, a college officer legally required to uphold affirmative action, of racism and of impeding affirmative action in a specific factual context, are such statements protected by the First Amendment to the United States Constitution?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Don VanDenBerg and respondents the Regents of the University of California and Victor Kimura.

The Superior Court of Santa Cruz County was a respondent to the Petition for Writ of Mandate to the California Court of Appeal; petitioner was the real party in interest.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

CONSTITUTIONAL PROVISIONS

STATUTES

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PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

The petitioner Don VanDenBerg respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal for the State of California, Sixth Appellate District, entered in the above-entitled proceeding on May 30, 1991.

OPINIONS BELOW

The opinion of the Court of Appeal for the State of California, Sixth Appellate District, was originally reported at 230 Cal. App. 3d 1235, 281 Cal. Rptr. 691, but was withdrawn from publication by the California Supreme Court. It is reprinted in the appendix hereto, A-1 to A-25.

The Order and Opinion of the Superior Court in and for Santa Cruz County, State of California, denying summary judgment, was not reported. It is reprinted in the appendix hereto, pp. A-20 to A-21.

JURISDICTION

The judgment of the Court of Appeal for the State of California was entered on May 30, 1991, directing the trial court to vacate its order denying defendants' motion for summary judgment and enter an order granting the motion for summary judgment as to all defendants. On August 22, 1991, the Supreme Court of the State of California denied review. This petition for certiorari was filed within 90 days of that date pursuant to 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, or to petition the government for a redress of grievances.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

In September 1988, a member of petitioner VanDenBerg's staff suggested that an Asian theme dinner event be rescheduled. As Bursar of Crown College, a college of the University of California at Santa Cruz (UCSC), VanDenBerg was responsible for the scheduling of such events, although he had not personally participated in the original scheduling of the dinner. The dinner by mere coincidence had been set for December 7, 1988, the anniversary of the bombing of Pearl Harbor by the Japanese in World War II. The staff member was concerned that this might exacerbate emotional memories of both Japanese-American and other ethnic groups. As Bursar, VanDenBerg approved the rescheduling of the dinner to January. This dinner was originally to be held in cooperation with Merrill College, also a UCSC college, whose Bursar is Ziesel Kimura, wife of respondent Victor Kimura. On December 12, 1988, she spoke with Bursar VanDenBerg about the rescheduling. She then told her husband that VanDenBerg had persuaded the Provost of Crown College to recant an apology over the rescheduling and that VanDenBerg supported the rescheduling of the event. These statements were untrue. Respondent Victor Kimura then sent an open letter to VanDenBerg with copies to ten other persons and entities, including college officials, student organizations and the student newspaper. The letter is reprinted in the appendix hereto, pp. A-23 to A-25.

The letter and subsequent attacks by students and by members of the college ignited a storm of criticism, including death threats against VanDenBerg. The letter has literally destroyed VanDenBerg's career and his emotional health. The letter stated:

1. Crown College is racist and VanDenBerg, its Bursar, acted out of racist motivation in rescheduling the event;

2. The purpose of rescheduling the dinner was to punish Filipino students;

3. VanDenBerg punished the Filipino students for racist, bigoted reasons;

4. VanDenBerg is ignorant of the fundamental aspects of affirmative action;

5. VanDenBerg discriminated against Filipino students based on ethnic differences;

6. VanDenBerg is a perfect example of being racist and bigoted;

7. VanDenBerg was at least responsible for "severely impeding in a major way" the campus's affirmative action program;

8. VanDenBerg lacked a commitment to affirmative action;

9. VanDenBerg's explanation of the rescheduling has been nothing but racist rhetoric and perverted excuses — in other words, VanDenBerg has been lying about the rescheduling of the dinner.

VanDenBerg subsequently was subjected to public and private criticism both by his peers and by students. A victim himself of the Holocaust, VanDenBerg has had a complete nervous breakdown and has been unable to return to his job as Bursar.

II. PROCEDURAL HISTORY

On October 21, 1989, VanDenBerg brought this action for defamation and intentional infliction of emotional distress. Respondents demurred on the basis that the statements in Kimura's letter were constitutionally protected opinion, not fact, based on the authority of *Gertz*

v. Robert Welch, Inc., 418 U.S. 323 (1974).[1] The demurrer was overruled.

Subsequent to the trial court's overruling of the demurrer, this Court decided *Milkovich*, which substantially diminished, if it did not eliminate, constitutional protection for opinions. The focus after *Milkovich* in any event is on fact versus non-fact, that is, the provability of the defamatory statements. Although *Milkovich* strengthened Petitioner's argument that no constitutional protection should be afforded Kimura's letter, Respondents viewed its teaching differently. They filed a Motion for Summary Judgment, or alternatively, for Summary Adjudication[2] again arguing that Kimura's letter contained mere opinion, not facts. In support of that motion *Respondents* filed a statement of undisputed facts, which include the following:

> 105. As Bursar, VanDenBerg was in a position to do significant good in the area of *racial relations, e.g.*, in educating members of the community, in hiring policy, in *affirmative action* policy, in assigning student residences.

[1] As this Court observed in *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990), the fact/opinion dichotomy of *Gertz*, 418 U.S. at 339-40 was mere *dicta; Gertz* indeed went on to collect damages for having been called a Marxist-Leninist. However, that *dicta* spawned numerous holdings by state courts that statements of opinion could not constitutionally be subjected to defamation suits not matter how grave the reputational interests involved. *See, e.g., Gregory v. McDonnell-Douglas Corp.*, 552 P.2d 425, 427-28 (Cal. 1976). As a result, state defamation law now has become a mixed bag of state and federal issues due perhaps to the overzealous adherence of state courts to the *Gertz dicta*. This petition for certiorari therefore involves both questions of constitutional protection and the concept of federalism in a judicial system in which the jurisdiction of state and federal courts overlap.

[2] On state law grounds, the California Court of Appeal refused to consider any of the issues arising out of the trial court's ruling on any of the parties' motions for summary adjudication, including the trial court's finding that VanDenBerg was a public figure. *Kimura v. Superior Court*, 281 Cal. Rptr. 691, No. H008154, slip op. at 3-4 (Cal. Ct. App. May 30, 1991), A-3 to A-4. Therefore, for purposes of this petition, *plaintiff is not a public figure.*

106. The position of bursar is one with the ability to do significant harm in the area of *racial relations.*

107. VanDenBerg would expect to be criticized if he did nothing about disciplining "something that fairly constituted *racist and discriminatory behavior.*"

108. Other University administrators had been publicly criticized, in the student newspaper and elsewhere, for their handling of issues involving *racism* and *affirmative action* in the campus community.

Defendants' Joint Separate Statement of Issues As to Which There Is No Substantial Controversy at 16-17 (emphasis added). Respondents obviously viewed racial relations, racial discrimination and affirmative action as involving concrete conflict, action and behavior, all capable of factual definition, or otherwise these matters had no place in a statement of undisputed facts. The trial court also viewed those concepts as provably false since it denied Defendants' Motion for Summary Judgment.[1] As is discussed *infra* at 16-19, the California Court of Appeal, without explanation, contrary to Respondents' position in their own statement of undisputed facts, and contrary to the multitude of cases addressing racial discrimination, opined that "'affirmative action' is an exceptionally imprecise term which lacks uniform understanding."

[1] This Motion for Summary Judgment was directed—inadvertently it would seem—only toward the defamation count. However, the California Court of Appeal observed in its decision "that if it [plaintiff's cause of action for intentional infliction of emotional distress] is based on the same facts as the defamation claim, it will meet the same constitutional fate." Court of Appeal Decision at 1-2, A-1 to A-2. Both causes as against Respondent Kimura are based on the same set of facts; as against the remaining defendants there are but a few additional facts relating to the intentional infliction of emotional distress beyond those contained in the defamation action.

Court of Appeal Decision at 23, A-23[1].

On March 4, 1991 Respondents filed a Petition for Writ of Mandate to the California Court of Appeal, assigning a number of errors to the trial court. The Court of Appeal found but one issue necessary to its decision: whether the letter constituted actionable assertions of fact or constitutionally protected opinion. The Court of Appeal held that Kimura's letter was protected by the First Amendment from redress under state law for damage to VanDenBerg's reputation and emotional well-being. VanDenBerg petitioned the California Supreme Court for review. On August 22, 1991, that court denied review and ordered the Court of Appeal's decision withdrawn from publication. VanDenBerg then filed this petition for certiorari.

III. HOW THE FEDERAL QUESTION WAS PRESENTED

The sole basis for Respondents' demurrer in the lower court was that the Kimura letter was constitutionally protected opinion. However, in their Motion for Summary Judgment they raised a number of other state law and federal constitutional issues. The trial court denied the Motion for Summary Judgment. On Writ of Mandate to the California Court of Appeal, Respondents again raised the fact/opinion dichotomy as well as the additional constitutional issues and state law issues. *However, the court did not address any of the other state or federal issues other than the constitutional question of whether Kimura's letter is constitutionally protected opinion as opposed to unprotected fact.* To dispel any doubt as to the

[1] The Court of Appeal also stated that "VanDenBerg argues that the reference [in Kimura's letter] to affirmative action means that he impeded the University's affirmative action program. . . ." Court of Appeal Decision at 23, A-23. Kimura's letter contains more than a "reference" to affirmative action, and its meaning does not depend on VanDenBerg's argument. Kimura's letter flat-out states that VanDenBerg is impeding the affirmative action program. Kimura letter at 2, A-30.

constitutional basis for the lower court's judgment, the final portion of that decision will be quoted at length:

> . . . The characterization of VanDenBerg's action as an attempt to "punish" young Filipino students is purely opinion, resting on the disclosed fact of his decision not to participate in the dinner. An "incredible level of bigotry" is imprecise and exaggerated. VanDenBerg argues that the reference to affirmative action means that he impeded the University's affirmative action program, but if [sic] "affirmative action" is itself an exceptionally imprecise term which lacks uniform understanding.
>
> . . . [W]e observe that far worse has been found within the penumbra of *First Amendment protection* . . . . Restating, again, the test of *constitutional protection* - "whether a reasonable fact finder could conclude that the published statements imply a provably false assertion" *(Moyer v. Amador Valley J. Union High School Dist., supra,* 225 Cal. App. 3d at p. 724) - we hold that this unreasonable, emotional and angry letter cannot reasonably be understood as implying any facts, that it is more opinion than fact, and as such is not appropriate for jury determination. Since it is also part of the rhetoric generated on an explosive topic of public concern, namely, racism on the college campus, an area entitled to *constitutional protection,* and since we do not think any reasonable reader would take it for a reasoned factual accusation, we conclude that it is not an actionable defamation and that it is *constitutionally protected expression.*

Court of Appeal Decision at 23-24, A-1 to A-19 (emphasis added). The Court of Appeal clearly ordered summary judgment against the Petitioner on the ground that Kimura's statement was protected by the First Amendment.

This federal question was raised at demurrer and denied; it was on Motion for Summary Judgment and

denied; it was raised on Petition for Writ of Mandate to the California Court of Appeal and there granted. It was raised again on Petition for Review to the California Supreme Court, and review was denied. This issue is dispositive as the California Court of Appeal has ordered the trial court to enter judgment on the defamation action (judgment on the emotional distress claim will follow based on the Court of Appeal's *dicta*, *see supra* at 6 n.3), and therefore this Court should address the sole issue reached in a decision by the court to which writ of certiorari is sought.

REASONS FOR ALLOWANCE OF THE WRIT

The California Court of Appeal decided an important constitutional question affecting state law causes of action in an unsettled area of legal conflict between defamation law and First Amendment protection which requires the Supreme Court's guidance to render an outcome consistent with the principles of federalism and the proper balance between reputational interests and freedom of expression.

I. PRINCIPLES OF FEDERALISM

No case better illustrates the need for balance between the realm of state law interests and the limited but equally important federal law interests than *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). From *dicta* supporting the laudable principle of free expression of ideas arose an ironclad doctrine establishing a fact/opinion dichotomy in defamation law: if a given statement—no matter how false and injurious—could be labeled opinion, the speaker stood behind an impervious First Amendment shield no matter what the speaker's motives, no matter what the plaintiff's proof, no matter what the harm inflicted. But the most puzzling *fact* about this doctrine is that it was taken from a lawsuit in which the injured party was able to recover damages under state tort law for injury to his reputation, even though subsequent state court decisions would likely have found the statements immune. Like an unwanted guest, the doctrine of the fact/opinion dichotomy has hung on long after its time has passed, notwithstanding its rejection in *Milkovich*, as the lower court's holding quoted earlier illustrates.

The basic unsoundness of this doctrine is another reason for granting the writ of certiorari herein, and will be discussed *infra*. But a more troubling issue is the tendency of state courts to blindly follow not the justly-limited *holding* of federal case law but portions of the Court's rationale not essential to its decisions. This

occurs, and occurred in the California Court of Appeal's decision, because state courts have over-vindicated federal constitutional rights at the expense of the proper area of the court's state law expertise, the protection of state law interests that form the common law core of our social contract. This happened here due to four interrelated causes: (1) the lower court failed to consider California constitutional law; (2) the lower court based its decision in part on California decisions construing pre-*Milkovich* federal constitutional protections for opinion speech; (3) the lower court misconstrued the holding and teaching of *Milkovich*,[5] and (4) the lower court ignored the factual content of Kimura's statements. Causes 3 and 4 relate to the "provably false" standard of *Milkovich* and will be discussed later. The first two causes, however, are clearly an erroneous application of federal law by a state court. The lower court's erroneous application of federal law results from the lack of a definitive United States Supreme Court decision to clarify the boundaries between state law interests and federal constitutional protections.

A. *Absence of State Constitutional Law Consideration*

Had the Court of Appeal sought a state law basis for its holding, presumably it could have found it in the California Constitution, which provides in pertinent part that

[5] Defendants portrayed *Milkovich* as favorable to their position, arguing that in *Milkovich* this Court "restated the fact/opinion doctrine and reemphasized the protection afforded under the First Amendment to speech on issues of public importance. Under *Milkovich*, Kimura's statements are entitled to 'full constitutional protection.'" Defendants' Memorandum of Points and Authorities in Support of Petition for Writ of Mandate at 26. They cited Justice Brennan's dissent in *Milkovich* as the holding. *Id.* The Court of Appeal simply dismissed *Milkovich*, observing that this landmark decision "does not change substantive law in this area." Court of Appeal Decision at 11, A-11. This statement ignores the limiting effect *Milkovich* imposes on the ability of lower courts to deny claims for reputational interests on First Amendment grounds. It plainly misstates *Milkovich's* abolition—not its restatement—of the "artificial [fact/opinion] dichotomy." 110 S. Ct. at 2706.

"[e]very person may freely speak, write and publish his or her sentiments on all subjects, *being responsible for the abuse of this right.* A law may not restrain to abridge liberty of speech or press." California Constitution, art. 1, § 2(a) (emphasis added). This provision was never raised at any juncture of the trial court proceedings by Respondents, nor was it ever considered by the Court of Appeal. Instead the lower court relied on the First Amendment to the federal Constitution to bar VanDenBerg's state law claim. The error of this judgment is two-fold: first, it is a misinterpretation of the scope of the federal Constitution; second, it is a misapplication of federal law itself. Had the lower court chosen to bar VanDenBerg's claim on state constitutional grounds, it could have done so.[6] None of this Court's decisions restricting the extent of First Amendment intrusion into state tort law "limits the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980). Unlike *PruneYard,* the lower court here wrongly extended federal protection into an area of state law. Simply put, when drawing boundaries it is best to be standing on one's own ground. Here the Court of Appeal drew state and federal boundaries while standing on *federal* ground, relying still on the implications not of *Milkovich* but of *Gertz.*

[6] Actually, there is no cogent California authority for so doing; all California decisions on defamation appear to be based upon the *Gertz dicta,* and thus the First Amendment to the United States Constitution, as recognized in a recent decision of the California Court of Appeal, First District: "Respondents suggest that a categorical exemption for opinion exists independently under California law. We find no support for this proposition in the cited defamation cases. Nor is it likely that such a rule will be adopted under article I, section 2 of the California Constitution." *Kahn v. Bower,* 284 Cal. Rptr. 244, 248 n.2 (Ct. App. 1991) (decided after judgment in the case *sub judice*).

B. *The Lower Court Applied Pre-Milkovich California Decisions Echoing the Gertz Dichotomy*

While the Court of Appeal postulated that "[i]t has long been the law that mere statements of 'opinion' are not actionable," slip op. at 8, A-8, it cited no authority for that proposition.[7] Instead it relied on California case law based solely on the *Gertz dicta*, namely *Okun v. Superior Court*, 629 P.2d 1369 (Cal.), *cert. denied*, 454 U.S. 1099 (1981) (*see* Court of Appeal Decision at 8, A-8); *Gregory v. McDonnell-Douglas Corp.*, 552 P.2d 429 (Cal. 1976) (*See id.* at 8, A-8); *Baker v. Los Angeles Herald Examiner*, 721 P.2d 87 (Cal. 1986), *cert. denied*, 479 U.S. 1032 (1987) (*see id.* at 9, A-9); *Moyer v. Amador Valley Joint Union High Sch. Dist.*, 275 Cal. Rptr. 494 (Ct. App. 1990) (*see id.* at 11, A-11); *Slaughter v. Friedman*, 649 P.2d 886 (Cal. 1982) (*see id.* at 13, A-13); *Good Gov't Group of Seal Beach, Inc. v. Superior Court*, 586 P.2d 572 (Cal. 1978), *cert. denied*, 441 U.S. 961 (1979) (*see id.* at 13, A-13); *Miller v. Nestande*, 237 Cal. Rptr. 359 (Ct. App. 1987) (*see id.* at 15, A-15); *Carney v. Santa Cruz Women Against Rape*, 271 Cal. Rptr. 30. (Ct. App. 1990) (*see id.* at 15, A-15); *White v. Davis*, 533 P.2d 222 (Cal. 1975) (*see id.* at 15, A-15); and *Desert Sun Publishing Co. v. Superior Court*, 158 Cal. Rptr. 519 (Ct. App. 1979) (*see id.* at 24, A-24). These cases represent the only California authority relied on by the Court of Appeal and in every instance the decision was founded upon the constitutional protection of speech offered by the First Amendment. Further, in every case addressing the issue of whether the speech consisted of fact or opinion it was held protected due to the "rule" which has evolved out of

[7] In fact, the lower court referred to the Restatement which provides the contrary: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." Restatement (Second) of Torts § 566 (1965).

the *Gertz dicta*.* The language followed by these courts and directly quoted from the controlling California Supreme Court decisions addressing the fact/opinion dichotomy makes clear two vital points—first, that California protection for defamatory speech opinions is firmly based on the First Amendment to the United States Constitution, and second, that California's opinion speech exception is based on the *Gertz dicta* and far from being abolished by *Milkovich* survives in cases like the one sub judice:

1. *Gregory* (1976). This seminal California opinion set forth the opinion defense clearly and established its constitutional basis:

> An essential element of libel . . . is that the publication in question must contain a false statement of *fact*. . . . The reason for the rule, well stated by the high court, is that "Under the First Amendment there is no such thing as a false idea." . . . In this context courts apply the Constitution by carefully distinguishing between statements of opinion and fact, treating the one as constitutionally protected and imposing on the other civil liability for its abuse.

552 P.2d at 427-28 (quoting *Gertz*, 418 U.S. at 339).

2. *Good Government Group* (1978). This decision was squarely based on the conversion of the *Gertz dicta* into a rule by *Gregory:*

> In *Gregory*, we discussed the difference between a statement of fact and a statement of opinion in an action for libel. . . . We reasoned that "there is no such

* A possible exception is the *Slaughter* decision, in which the court observed that "[a]lthough accusations of 'excessive' fees or 'unnecessary' work when made by laymen might indeed constitute mere opinion, similar accusations by professional dental plan administrators carry a ring of authenticity and reasonably might be understood as being based on fact." 649 P.2d at 889. This logic hardly favors defendant Kimura, whose statements as a fellow colleague also carrying affirmative action responsibilities, given the *Slaughter* rationale, would more likely be taken as fact.

thing as a false idea" and that an essential element of an action for libel is a false statement of fact.

586 P.2d at 575 (citations omitted).

3. *Okun* (1981). The court in *Okun* again quoted the famous *Gertz dicta* at length, concluding that "[t]he implications deprecatory to plaintiff are mere opinion, not libelous." 629 P.2d at 1374. By now every defamation plaintiff in California had an initial hurdle to overcome: if the defamatory statements could be understood as the speaker's opinion, the jury would never hear the case.

4. *Baker* (1986). "The falsehood requirement is grounded in the First Amendment itself. . . . The crucial question in this case is whether the statement at issue was a statement of fact or a statement of opinion." 721 P.2d at 90. The court reasoned that since the statement began with the phrase "[m]y impression is . . ." it was an opinion. This notion was expressly rejected by this Court in *Milkovich*, 110 S. Ct. at 2706.

The blanket protection for opinion arising out of these cases was an erroneous application of *Gertz* and more important, an overzealous application of federal constitutional law at the expense of state tort law. Moreover, the lower court in the case at bar misapplied the teachings of *Milkovich*, which attempted to establish a new balance between *responsible* free expression and a person's right to maintain his or her good name.

II. STRIKING A BALANCE BETWEEN FREE SPEECH AND REPUTATIONAL INTERESTS

Gertz did not in itself establish a new defense to defamation. Instead, the state courts interpreted the *Gertz dicta* as providing the basis for such a *rule*, as it was termed in *Gregory*, 552 P.2d at 427. This Court refused to create such a "wholesale defamation exemption for anything that might be labeled 'opinion'" in *Milkovich*, 110 S. Ct. at 2705. Instead this Court recognized that existing constitutional protections were sufficient to safeguard speech without further impinging on our

society's rightful "interest in preventing and redressing attacks upon reputation." *Id.* at 2707 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)). In *Milkovich* this Court sought to "hold[] the balance true." *Id.* at 2708. Further guidance is needed to relegate the fact/opinion dichotomy back to its rightful place as *dicta*, with opinion meaning only idea. The lower court in this case misapplied *Milkovich* and ignored the factual statements and connotations in Kimura's letter.

A. *The Lower Court Misapplied Milkovich*

As previously discussed, the California Court of Appeal relied on prior California cases interpreting the *Gertz dicta* as stating a *rule* protecting opinion from defamation redress.[9] The lower court distinguished *Milkovich* as "not chang[ing] substantive law in this area" (Court of Appeal Decision, slip op. at 11, A-11) and merely requiring a totality-of-circumstances test already used by the California courts (*id.* at 10-11, A-10 to A-11). This is not an accurate portrayal of *Milkovich* generally; the *Milkovich* rationale was not correctly applied in the instant case; and the California case law, as discussed previously, had not so held as regards the fact/opinion dichotomy. As the Ninth Circuit Court of Appeals observed, "[l]anguage in *Gertz*, always the prime source cited for the proposition that statements of opinion have first amendment protection, in effect seems to have preempted California's own case law evolution in this area. . . . Since the state cases are cast in first amendment terms, it is difficult for us to use a different mold." *Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987) (Kennedy, J.).

The focus after *Milkovich* is on the provability of

[9] The lower court did concede that these "California decisions have tended to 'conflate' common law principles and constitutional doctrine on the definition of opinion." Court of Appeal Decision, slip op. at 8, A-8 (quoting *Koch v. Goldway*, 817 F.2d 507, 508 (9th Cir. 1987)). The court evidently recognized the inherent artificiality and confusion surrounding the fact/opinion dichotomy, but was unable to free its rationale from the tempting and deceptive facility of that doctrine when used to label a scurrilous attack as mere opinion.

statements, not on whether they represent the speaker's opinion. Even if Kimura's attacks on VanDenBerg were "pure" opinion they would not be given absolute constitutional protection—denying any jury consideration of the *facts* of this case—unless the letter were completely devoid of defamatory statements which could be *proved* false. The lower court failed accurately to assess the provability of the Kimura letter in light of *Milkovich*.

By contrast, the California Court of Appeal, First District, rightly determined that *Milkovich* eliminated any constitutional basis for the *Gertz* "opinion rule." *Kahn*, 284 Cal. Rptr. at 248-49. In *Kahn*, decided after the case at bar, the court ruled that the defendant's statements referring to a social worker's "incompetence" were "reasonably susceptible of a provably false meaning," even if the assertion "approach[ed] the outer limits of vagueness and subjectivity." *Id.* at 250. This radically different approach to defamatory statements even less factually-based than those contained in Kimura's letter is further proof that this Court's definitive treatment of this area of defamation law would assist the lower courts in reaching uniform and constitutionally correct results.

B. *Kimura's Letter is Provably False.*

Kimura's letter is provably false on two levels, just as this Court observed regarding the example cited in *Milkovich*, "I think Jones lied." 110 S. Ct. at 2706 n.7. First, Kimura called VanDenBerg a racist. That statement is now excused as a "heat of the moment" mistake. Evidently Kimura is now conceding that he had no basis for calling VanDenBerg a racist but did so anyway, a tacit admission of falsehood.

However, it is on a deeper level that the letter assumes its most insidious, unfair, injurious, damaging and provably false character: it states that VanDenBerg rescheduled the dinner to punish students because of their race. It accuses him of impeding affirmative action. This open letter from a colleague accused this man, himself a victim of racism, to whom racial discrimination is no

amorphous concept but a hideous, nightmarish reality, of purposefully discriminating against students under his charge, in a matter under his control, reflecting on his honor and reputation as Bursar, *solely on the basis of their color and national origin.* This attack can hardly be compared with the epithet in *Koch*, where the statements were considered opinion (or more accurately, as non-factual hyperbole) because they were unrelated to the factual context in which they were delivered:

> It is obvious to us, and must have been so to all who heard the statement, that the mayor had not suddenly lost interest in rent control and politics in order to focus on war criminals.
>
> It is unreasonable to construe the remarks to say or imply that the plaintiff is in fact Ilse Koch the war criminal, for no one would be so credulous as to conclude that a war criminal on the run would use her true name and project herself in public debate. The statement cannot be interpreted to say that the plaintiff committed crimes similar to those of a Nazi war criminal, for it simply does not mention those matters or suggest that inference.

Koch, 817 F.2d at 509. Kimura's attack was directly related to VanDenBerg's position as Bursar and to the dinner itself. In the *Koch* context, Kimura would have in fact accused VanDenBerg of actually being a war criminal. Kimura's letter was not mere hyperbole or insult. He plainly and factually accused VanDenBerg of having discriminated on the basis of race.

In a Title VII[10] context or in an employment termination matter, the issue of whether VanDenBerg had in fact canceled this dinner to punish Filipino students would be provable. Racial discrimination would, if it affected employment, justify damages; if true, it would likely be cause for discipline or termination of employment. The

[10] Title VII of Pub. L. 88-352, the Civil Rights Act of 1984, amended by Pub. L. 92-261, the Equal Opportunity in Employment Act of 1972, is codified as 42 U.S.C. §§ 2000e-2000e-17 (1988).

trial court so held, and the Court of Appeal erred in providing constitutional protection to this defamatory letter.

CONCLUSION

The lower court failed to adhere to the "true balance" struck in *Milkovich*. That balance is vital to our federal system. It permits states to adopt and enforce tort laws subject only to specific and very limited federal constitutional restrictions. In this case, a responsible balance between a good man's reputation and another man's freedom of expression has not been struck. The teachings of *Milkovich* have been ignored. This Court should issue certiorari in order to clarify the boundaries between state and federal law, and between reputational interests and free speech, in this troubling and conflicting area.

INDEX TO APPENDIX

CERTIFIED FOR PUBLICATION

In The
Court Of Appeal
Of The State Of California
SIXTH APPELLATE DISTRICT

VICTOR KIMURA, et al.,
Petitioners,

vs.

THE SUPERIOR COURT OF SANTA CRUZ COUNTY,
Respondent;

DON VANDENBERG,
Real Party in Interest.

No. H008154

(Santa Cruz County Super. Ct. No. 111787)

This is a petition for writ of mandate (Code Civ. Proc., § 437c, subd. (1)) following the respondent court's denial of petitioners' motions for summary judgment or summary adjudication.

Plaintiff and real party in interest Don Vandenberg brought the action against defendant petitioners Victor Kimura, the Regents of the University of California (Regents), and Robert Stevens for damages for defamation and intentional infliction of emotional distress.[1] The

[1] The cause of action for intentional infliction of emotional distress is not before us since the summary judgment motion was not directed at that cause. We observe, however, that if it is based on the same facts as the defamation claim, it will meet the same constitutional fate. (See *Readers Digest Assn.* v. *Superior Court* (1984) 37 Cal.3d 244, 265; *Miller* v. *Nestande* (1987) 192 Cal.App.3d 191, 202.)

action was based primarily on a letter which Kimura wrote to Vandenberg accusing him of being racist and bigoted. Kimura moved for summary judgment on the defamation claim, on the ground the entire letter was constitutionally protected by the First Amendment, or alternatively for summary adjudication that certain parts of the letter were so protected. Defendants Regents and Stevens joined in the motion and also noticed their own motion on similar grounds. These defendants also requested an adjudication that Vandenberg is a public official for purposes of this action.

The respondent court denied the motion for summary judgment but did grant part of the motion for summary adjudication, ruling that plaintiff Vandenberg was a public official. The court found a triable issue of fact exists whether the defendants acted with malice. Defendants seek statutory writ review of this order.

For reasons we shall state, we hold as follows: (1) the newly revised summary judgment procedure does not permit summary adjudication of legal issues unless they are equivalent to entire causes of action or affirmative defenses; hence petitioners are not entitled to partial summary adjudication as to portions of the allegedly defamatory letter; (2) the partial ruling regarding the public official status of Vandenberg was similarly unauthorized, and must be stricken, and we will not rely on it for analysis; (3) whether or not Vandenberg is a public official, the allegedly defamatory communication is not actionable because it constitutes constitutionally protected rhetoric generated in discussion of a matter of public concern, and does not imply the existence of defamatory facts; hence defendants are entitled to summary judgment in their favor on the defamation claim.

Summary Adjudication of Issues under Amended Statute

The trial court's order was filed on February 19, 1991. Amended effective January 1, 1991, Code of Civil

Procedure section 437c, subdivision (f), now provides for summary adjudications of causes of action or affirmative defenses. This is a change from prior law which permitted adjudication of *issues*. Further, the statement of legislative intent regarding this amendment says: "It is . . . the intent of this legislation to stop the practice of adjudication of facts or adjudication of issues that do not completely dispose of a cause of action or a defense." (Stats. 1990, ch. 1561, § 1, p. 6235.) Although defendants made their summary judgment and summary adjudication motions in November 1990, before the effective date of this change, the statute affects only procedural rights and is therefore applicable to pending cases. (2 Sutherland, Statutory Constitution (4th ed. 1986) § 41.09, p. 396; *Rutherford* v. *Board of Trustees* (1976) 64 Cal.App.3d 167, 173.) We conclude that petitioner Kimura is not entitled to piecemeal determination of the constitutional status of portions of the allegedly defamatory communication, and we therefore do not discuss his motion for summary adjudication, which in any case would be moot in light of our conclusion, *infra*, that the entire communication is protected speech.

We also conclude that defendants were not entitled to a ruling on a motion for summary adjudication as to whether Vandenberg was a public official at the time of pertinent events. No party has petitioned for review of that adjudication. However, the trial court's entire order is necessarily before us by reason of defendants' petitions. In order to dispose of the case we will be obliged to direct the trial court to vacate its order and enter a new and different order. In obedience to presently effective law, we will direct that the adjudication regarding public official status be stricken, and we will analyze the motion for summary judgment on the defamation cause of action as though the public official status issue had not been separately resolved. (As we will point out, the point is not basic to our analysis because the speech touches on matters of public concern.)

Record

We state the record in accordance with the principles governing motions for summary judgment, which are that the evidence is viewed in the light most favorable to the party resisting the motion, with all inferences made and ambiguities resolved in his favor. (E.g. *Parsons Manufacturing Corp. Inc.* v. *Superior Court* (1984) 156 Cal.App.3d 1151, 1158; *Pupko* v. *Bank of America* (1981) 114 Cal.App.3d 495, 498.)

Vandenberg's complaint alleges that he is the Bursar of Crown College, one of the colleges comprising the University of California at Santa Cruz (University); that defendant Regents are the governing body of that institution, defendant Stevens is its Chancellor, and defendant Kimura was at all relevant times employed at the University as Budget Director in the Office of Finance and Planning.

On or about December 12, 1988, Kimura published on University letterhead a letter addressed to Vandenberg which was circulated to and seen and read by University officials, students, staff, faculty members, and the press. The letter in its entirety is appended to this opinion in full as Appendix A. That letter protested Vandenberg's cancellation of an event referred to as Filipino College Night and said that the action "reinforced the view that Crown College is extremely racist, a growing campus view held by people of color and by enlightened faculty, staff, students and campus administrators." The letter was two pages long and contained multiple other accusations that the cancellation was an attempt to "punish" Filipino students and resulted from bigotry and racism.

The event precipitating this letter was Vandenberg's refusal to have Crown College participate in a dinner honoring Filipino culture because it was scheduled on December 7, 1988, the anniversary of the Japanese attack on Pearl Harbor. The background of this controversial decision is as follows: The University colleges, Crown

College and Merrill College, share food service facilities and a tradition of jointly holding a monthly event known as "College Night" presenting a theme dinner celebrating a particular culture. In the fall of 1988, Vandenberg was acting as the Bursar, who is the head of staff, of Crown College. He had supervisory authority over student discipline, issues of college policy, and general management of all activities at Crown College affecting student life and activities. At some time in the fall of 1988, the activities coordinators for Crown and Merrill Colleges proposed holding the aforementioned Filipino dinner on December 7, 1988. But Vandenberg agreed to a proposal from his staff to cancel the dinner. Merrill College, however, which was not under Vandenberg's jurisdiction, went ahead with the Filipino dinner.

Following Crown's refusal to participate in the Filipino dinner, some members of the University community criticized the Crown staff, particularly Vandenberg and the Provost, Peggy Musgrave. Among those criticisms was Kimura's letter, appended hereto, which he sent to Vandenberg by campus mail on December 12, 1988. The letter was widely distributed to faculty and staff and generated much controversy. It was published in the campus newspaper, *City on a Hill,* on January 5, 1989. The discussion became so emotional in tone that Vandenberg even received death threats from some individuals. Provost Musgrave resigned from her office on December 14, 1988, citing a lack of support from defendant Stevens with regard to Kimura's attack upon her and Vandenberg.

Chancellor Stevens issued a statement to the campus community about the "Asian Food Affair" dated December 21, 1988, in which he concluded that Crown's decision not to serve Asian food at Crown College on Pearl Harbor night was an error of judgment which understandably sent inappropriate signals about the campus commitment to diversity. A report prepared by Vice-Chancellor Bruce Moore at Steven's request concluded that Crown administration showed "'insensitivity'" and was

oblivious to the fact that many outside the University would view the linkage between Asian food and World War II as institutional racism."

Vandenberg contends that as a result of Kimura's letter and the attacks on him that it provoked, he suffered severe injury, including total psychiatric disability such that he will never be able to return to his former job.

Discussion

We must decide whether the Kimura letter constitutes an actionable defamation. That task requires accommodating the protection of free expression of ideas under the First Amendment with the common law protection afforded to an individual's reputation. (See generally *Ollman* v. *Evans* (1984) 750 F.2d 970, 974.)

Putting aside for a moment all constitutional considerations, no communication gives rise to an action for defamation unless it either alleges or implies defamatory facts. (See generally Rest.2d Torts, § 566.)[2] It has therefore long been the law that mere statements of "opinion" are not actionable. Plainly, the constitutional question cannot arise until it is first determined that the statement is an actionable defamation under state law. (See *Stevens* v. *Tillman* (7th Cir. 1988) 855 F.2d 394, 400.)

However, courts have tended to factor First Amendment policies into the analysis when distinguishing fact from opinion for purposes of defamation actions. This may have been partly because the commonly used "totality of circumstances" test suggests a broad inquiry into all surrounding facts and policies, and partly it may be simple confusion of the two analytic tasks - deciding whether the statement is sufficiently factual to be actionable, and deciding whether it is worthy of constitutional protection. Thus it has been observed that the California decisions have tended to "conflate common

[2] "Expressions of Opinion[.] A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." (Rest.2d Torts, § 566.)

law principles and constitutional doctrine on the definition of opinion." (See *Koch* v. *Goldway* (9th Cir. 1987) 817 F.2d 507, 508-509, citing, e.g., *Okun* v. *Superior Court* (1981) 29 Cal.3d 442, 451; *Gregory* v. *McDonnell-Douglas Corp.* (1976) 17 Cal.3d 596.) And the seminal United States Supreme Court decision in *Gertz* v. *Robert Welch, Inc.* (1974) 418 U.S. 323, states the rule of First Amendment protection for opinions by similarly combining the two prongs of the test - the factual content, and the constitutional policies - in its classic analysis of the fact-opinion dichotomy: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competitor of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open debate on the public issues.'" (*Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at pp. 339-340, quoting *New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254, 270.)

Also, analysis tended to be fuzzy because of the notorious difficulty of fashioning any bright line between opinions and statements of facts. (See, e.g., *Ollman* v. *Evans, supra,* 750 F.2d at p. 975 [the court's constitutional duty to distinguish fact from opinion "is by no means as easy a question as might appear at first blush"]; *Baker* v. *Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260 [distinction of fact and opinion "frequently a difficult one"]; *Stevens* v. *Tillman, supra,* 855 F.2d at p. 398 [courts have come up with "buckets full of factors to consider but no useful guidance"].) Most decisions in this area contain a disclaimer that no bright line can be drawn. The following excerpt from the concurring opinion of Justice Robert Bork, in *Ollman* v. *Evans,* is perhaps a classic statement of the problem: "I start with candid recognition that the universe of statements cannot be neatly divided, by some logically discernible equator, into hemispheres of fact and opinion. Fact is the germ of opinion, and the

transition from assertion of fact to expression of opinion is a progression along a continuum. A reviewing court's charge is to determine, in light of the considerations inspiring First Amendment jurisprudence and the surviving policies underlying common law protection of reputation, the point at which we should draw the line marking off the portion of speech to be accorded the absolute constitutional protection of opinion rather than the conditional privilege afforded representations of fact." (750 F.2d at p. 1021.)

A recent decision of the United States Supreme Court has reexamined the fact-opinion dichotomy. (*Milkovich* v. *Lorain Journal Co.* (1990) 110 S.Ct. 2695, 2706 [*Milkovich*].) Although not disagreeing with the factors relied on in past decisions to determine if utterances are constitutionally protected, *Milkovich* said the governing test is an analysis of the totality of circumstances surrounding the utterance, rather than a rigid attempt to characterize a particular statement as "'fact'" or "'opinion.'" There is not "'wholesale defamation exemption for anything that might be labeled 'opinion.'" (*Id.* at p. 2705.) Instead, the court must make an independent judgment whether particular statements can reasonably be interpreted as stating actual defamatory facts about an individual. (*Id.* at p. 2706.) "[W]here a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault. . . ." (Id. at pp. 2706-2707.) Applying these principles, the court in *Milkovich* found a defamation action could proceed to trial because a reasonable factfinder could conclude that statements in a newspaper article implied that the plaintiff had perjured himself in a judicial proceeding. (*Id.* at p. 2707.)

It has been recognized that *Milkovich* does not change substantive law in this area. "[E]xisting constitutional doctrine remained operative to protect free expression of ideas. That is, statements that cannot be 'reasonably interpreted as stating actual facts' are still entitled to constitutional protection." (*Moyer* v. *Amador Valley J. Union High School Dist.* (1990) 225 Cal.App.3d 720, 724.) The *Moyer* case states that the dispositive question for the court is "whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion." (*Id.* at p. 724; see also *Milkovich, supra,* 110 S.Ct. at p. 2707.)

The leading California Supreme Court decision discussing what utterances are worthy of constitutional protection uses the "'totality of the circumstances'" test to determine what is defamatory and what is rhetorical hyperbole. (*Baker* v. *Los Angeles Herald Examiner, supra,* 42 Cal.3d at p. 260.) The decision begins by saying the question is one of law for the court. (*Ibid.*) And goes on to say, quoting an earlier decision, that "'where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.'" (*Id.* at p. 260, quoting *Gregory* v. *McDonnell Douglas Corp., supra,* 17 Cal.3d at p. 601.) The context in which the statement is made is crucial: "'[A] word is not a crystal, transparent and unchanged, [but] is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used. . . .'" (*Id.* at p. 261, quoting *Towne* v. *Eisner* (1918) 245 U.S. 418, 425.) Further, "[t]his contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication is directed." (*Id.* at p. 261.)

Such contextual analysis is used also in the Federal

cases considering the issue. One decision considers at least four factors: the language of the statement as a whole, the context in which it is made, the audience to which it is addressed (considering how such an audience would reasonably understand it), and the extent of factual verifiability of the statement. (*Ollman* v. *Evans, supra,* 750 F.2d at p. 979.)

The cases agree that the question is one of law for the court (e.g. *Baker* v. *Los Angeles Herald Examiner, supra,* 42 Cal.3d at p. 260) and therefore suitable for resolution by summary judgment (or even demurrer). (E.g., *Moyer* v. *Amador Valley J. Union High School Dist., supra,* 225 Cal.App.3d at p. 720 [demurrer]; *Koch* v. *Goldway, supra,* 817 F.2d at p. 507 [summary judgement].) Further, pretrial resolution is favored when appropriate because "[t]he threat of a clearly nonmeritorious defamation action ultimately chills the free exercise of expression." (*Baker* v. *Los Angeles Herald Examiner, supra,* 42 Cal.3d at p. 268.)

Vandenberg contends that whether a statement constitutes fact or opinion, according to California Supreme Court cases, is a question for the trier of fact. (Citing *Slaughter* v. *Friedman* (1982) 32 Cal.3d 149; *Good Government Group of Seal Beach, Inc.*, v. *Superior Court* (1978) 22 Cal.3d 672.) However, these cases do not so hold. Instead they stand for the proposition that "'[w]here . . . the allegedly libelous remarks could have been understood by the average reader in either sense, the issue must be left to the jury's determination. [Citation.]'" (*Slaughter* v. *Friedman, supra,* 32 Cal.3d at p. 154, quoting *Good Government Group of Seal Beach Inc.* v. *Superior Court, supra,* 22 Cal.3d at p. 682.) Each of these decisions resolved as a matter of law whether the allegedly libelous statements could be understood by the average reader in either sense (as fact or opinion) and found a jury trial appropriate when the court had decided that the statement was indeed susceptible of either of those reasonable interpretations. Similarly, it is our task to determine as a matter of law whether Kimura's letter could reasonably be understood by a trier of fact as alleging or implying

defamatory facts. If so, then a jury trial will follow; but if not summary judgment is mandated.

In considering the totality of the circumstances, the court must factor into the equation the extent to which the public is legitimately concerned with the issue discussed, that is to say, whether the matter is one of public concern. "The public has an interest in receiving information on issues of public importance even if the trustworthiness of the information is not absolutely certain. The First Amendment is served not only by articles and columns that purport to be definitive but by those articles that, more modestly, raise questions and prompt investigation or debate. By giving weight on the opinion side of the scale to cautionary and interrogative language, courts provide greater leeway to journalists and other writers and commentators in bringing issues of public importance to the public's attention and scrutiny." (*Ollman* v. *Evans, supra,* 750 F.2d at p. 983, quoted in *Baker* v. *Los Angeles Herald Examiner, supra,* 42 Cal.3d at p. 269.) And a matter may be of public concern whether or not the defendant is a so-called media defendant; the First Amendment protects the inherent worth of informing the public, and does not depend on the identity of the source. (*Miller* v. *Nestande* (1987) 192 Cal.App.3d 191, 198, citing *Philadelphia Newspapers, Inc.* v. *Hepps* (1986) 475 U.S. 767, 779-780 [con. opn. of Brennan, J.].)

We turn to the statement before us. The question of racism on the college campus, and accusations of racism against the head staff officer of a university college, are clearly matters of public concern. (Cf. *Stevens* v. *Tillman, supra,* 855 F.2d at p. 403 [accusations of racism against high school principal concern the public]; see also *Carney* v. *Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1019 et seq. [women's rights in the commmunity are a matter of public concern].) A university campus is a community in which the need for free discussion and airing of matters of concern is great; it has been said that "the campus is the sacred ground of free discussion." (*White* v. *Davis* (1975) 13 Cal.3d 757, 770.)

The fact that the subject matter of the utterance is one of public concern not only implicates constitutional values, but also for our purposes makes irrelevant the question whether Vandenberg is a "public" or a "private" figure. As the cases have held - sometimes framing the holding as a finding of "limited purpose public figure"[3] - if the defamation plaintiff is embroiled in a discussion touching on public concerns in the community, then that discussion is due the same constitutional protection as is rhetoric directed against a so-called "public figure." (See, e.g., *Ollman* v. *Evans, supra,* 750 F.2d at p. 975 [whether plaintiff a private or public figure, "opinions" protected]; *Brown* v. *Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747 [if speech is a matter of public concern, private figure plaintiff must prove *"New York Times* malice" (publication with reckless disregard of its truth) to recover presumed or punitive damages]; *Stevens* v. *Tillman, supra,* 855 F.2d at p. 403 [even if high school principal not a public figure for all purposes, the way she ran her school is a matter of public concern].)

Accordingly, because the matter here concerns the public, that factor in the equation favors the defendants because the First Amendment was intended particularly to protect and encourage "uninhibited, robust, and wide-open" debate on public issues. (*New York Times Co.* v. *Sullivan, supra,* 376 U.S. at p. 270.)

Vandenberg claims that the letter here accuses him of being racist and bigoted, and of impeding the University's affirmative action policy, and that the letter implies undisclosed defamatory facts which Kimura asserts to be true. However, the language of the letter, and particularly its use of the epithet "racist," does not have the tone of a reasoned accusation, but rather is more like the emotional rhetoric characteristic of debate in this area. One decision

[3] See *O'Donnell* v. *CBS, Inc.* (7th Cir. 1986) 782 F.2d 1414, 1417; *Stevens* v. *Tillman, supra,* 855 F.2d at page 403, speculating whether there may be a " 'limited purpose public official' " just as there is a limited purpose public figure, but concluding the point is not important when the matter discussed concerns the public.

has noted that the term "racist" has no precise meaning, can imply many different kinds of facts, and is no more than meaningless name-calling, not actionable under Illinois state defamation law. (*Stevens* v. *Tillman, supra,* 855 F.2d at pp. 401-402.) That court observed: "Accusations of 'racism' no longer are 'obviously and naturally harmful.' The word has been watered down by overuse, becoming common coin in political discourse." (*Id.* at p. 402.) *Stevens* concluded that accusations of racism by members of the Black community directed at a White principal were not actionable defamation under Illinois state law.

Another decision found the charge of "bigot," in context, mere rhetoric, since it was found in an exaggerated attack on the plaintiff noting his unfitness to shine another's shoes and expressing the opinion he should be "exiled to sagebrush country with other skunks and coyotes." (*Sall* v. *Barber* (Colo.App. 1989) 782 P.2d 1216, 1218.) The court concluded that a fair reading of the letter in question would not lead a reasonable reader to infer that it is based on undisclosed defamatory material. (*Id.* at p. 1219.) In fact, the court said the letter was clearly based on previously published material concerning an ongoing dispute. (*Ibid.*) The situation here is similar in that the Kimura letter plainly refers to and is primarily based on the known fact that Vandenberg cancelled the Filipino dinner.

Accusations of racism in a college community are more apt to be expressions of anger, resentment, and possibly political differences of opinion, than to be factual accusations intended to be taken literally. As was said in the context of student accusations of racism against the police at Rutgers University, "A consideration of the societal context at the time of the statements would reveal that the college community was to a degree polarized in its support of radical and conservative political views, and ... the statements referring to the mounted police would not suggest to the average reader that they were remiss in their duty or actually deserving of the invective, but that the author was angry, upset and resentful towards the

police." (*Scelfo* v. *Rutgers University* (N.J.Super. 1971) 282 A.2d 445, 449.) The accusations alleged as libelous in *Scelfo* included a headline in the student newspaper "YAFs, Cops, Rightists: Racist Pig Bastards." (*Id.* at p. 447.) That decision differed from ours in that the students did not identify specific policemen, so that the case turned mainly on the failure to identify the person defamed rather than on whether the accusations were defamatory in themselves. Nevertheless the foregoing observations as to the meaning of accusations of racism in a university community hold true here as well, and the letter here is even more readily characterized as an expression of anger and resentment which will not be regarded in that community as a literal, factual accusation.

Vandenberg relies on the decision in *Fleming* v. *Moore* (Va. 1981) 275 S.E.2d 632, which found that an accusation of racism could be an actionable defamation. There, a Black housing developer wished to develop land near that of a White university professor who attended public hearings opposing the development on grounds of pollution and conservation. After the responsible agency disapproved the development, the developer published an attack on the professor in the local paper captioned "RACISM" which accused the professor and others of opposing the project because they lacked concern for the "have-nots," and were greedy people incapable of seeing other viewpoints. The article also said the pollution excuse was a "sham." The professors were referred to as "tenured position-holders who live off the public dole at the expense of the working people. . . ." (*Id.* at p. 634, fn. 3.) It also said the professor did not "want any black people within his sight." (*Ibid.*) The court did not explain why these statements constituted "fact" or "opinion" nor did it engage in an overt totality of the circumstances analysis; it simply assumed that the developer's accusations were

factual.[4] One judge dissented, saying that "racism" is a word "bandied about in our society with complete abandon" to which he attached little significance. (*Id.* at p. 639, dis. opn. of Harrison, J.) Later, after the second trial, the Virginia court affirmed a judgment for the plaintiff but reduced the amount of the award, assuming without discussion that the accusation of racism contained sufficient factual content to be actionable. (See *Gazette, Inc.* v. *Harris* (Va. 1985) 325 S.E.2d 713, 746.) Its total comment was that "Fleming abandoned all judgment and reason in composing and publishing the advertisement. For example, he accused Moore of racial prejudice without possessing any objective basis for the charge." (*Ibid.*) The decision did not consider whether in fact there could be a demonstrable factual basis for the charge, nor did it elaborate on the evidentiary basis, if any, for its conclusion that Fleming had no objective basis for the charge.

There are other published decisions dealing specifically with the epithet "racist" or related accusations, but they are too few in number to present any definitive "majority" or "minority" view as to whether these terms may constitute actionable libel. Two such Federal decisions were decided before *Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at p. 323, and without benefit of that decision's concept of the non-actionable opinion as contrasted with the factual libel, reach opposing results. They are *Raible* v. *Newsweek, Inc.* (D.C.Penn. 1972) 341 F.Supp. 804, 807 [to call one a bigot "or other appropriate name descriptive of his political, racial, religious, economic or sociological philosophies gives no rise to an action for libel"]; and *Afro-American Publishing Co.* v. *Jaffe* (D.C.Cir. 1966) 366 F.2d 649 [implying that proprietor of new vending outlet

[4] The court opinion was mainly concerned with its holding that the libel was not "per se." After reversing a judgment for the professor because of incorrect instructions, the court sent the matter back for retrial. The conclusion that as a matter of law the developer's statements were actionable is necessarily implied by the opinion but is nowhere expressly stated. Accordingly, the opinion in *Fleming* offers no convincing underpinning for its result.

in Negro neighborhood was a racist and bigot was defamatory].) The *Jaffe* court emphasized that there was a lack of public concern in the issue which involved cancellation of the distribution of a Negro-oriented newspaper. (See *Afro-American Publishing Co.* v. *Jaffe, supra,* 366 F.2d at p. 656.) As later decisions such as *Ollman* v. *Evans, supra,* 750 F.2d at p. 970, have made plain, the public concern factor weighs heavily in favor of protecting the speech, and its absence may have influenced the *Jaffe* decision which found the implied accusations of racism actionable. In the *Raible* decision, on the other hand, summary judgment for the libel defendant was granted on the basis that name-calling is not actionable libel; the court pointed out that "Americans have been hurling epithets at each other for generations. . . . Certainly such name calling, either expressed or implied, does not always give rise to an action for libel." (*Raible* v. *Newsweek Inc., supra,* 341 F.Supp at pp. 808-809.)

The decision in *Ollman* considered statements in a newspaper column on the opinion page concerning the appointment of a professor at New York University to be the chairperson of another university's politics and government department. The column both noted that the professor was a Marxist and also cast aspersions on his scholarly reputation in the academic community. The decision generated seven opinions, most of which found the accusations of Marxism to be matters of "opinion," or non-actionable rhetoric; but the judges differed widely as to the accusations of low professional standing.[5] (Five out of eleven judges dissented from all or part of the opinion for the court.) The holding was based on a careful analysis of the entire context and contents of the column, and

[5] The professor was an avowed Marxist and the accusations of Marxism as such were therefore not actionable nor centrally in issue. He had published articles overtly supporting building a Marxist movement. (See e.g. "On Teaching Marxism and Building the Marxist Movement," an article in the Winter 1978 issue of New Political Science, referenced in *Ollman* v. *Evans, supra,* 750 F.2d at p. 1030, conc. opn. of Bork, J.) But the question whether he was a recognized scholar or an "activist" (whatever that may mean) was hotly debated.

particularly emphasized that the nature of the utterance as a whole was that of an opinion, making less important the particular isolated statements and accusations in it. Referring to the "breathing space" essential to expressions of opinion (*Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at p. 342), the opinion noted that "[t]he provision of breathing space counsels strongly against straining to squeeze factual content from a single sentence in a column that is otherwise clearly opinion." (*Ollman* v. *Evans, supra,* 750 F.2d at p. 991.)

In *Buckley* v. Littell (2d Cir. 1976) 539 F.2d 882, the Second Circuit found not actionable accusations of "fascist," "fellow traveler," and "radical right" directed against the journalist William Buckley, Jr. These terms were regarded as expressions on matters of opinion, such as what constitutes a fascist, and not to imply any particular defamatory facts.

In *Moyer* v. *Amador Valley High School Dist., supra,* 225 Cal.App.3d at p. 725, statements that a high school teacher was a "babbler" and the worst teacher in the school were found to be not actionable, constituting imprecise terms not intended to be taken literally.

Focusing on the language of Kimura's letter here, we believe that the audience to which it was addressed and circulated would not reasonably believe that it implied or was based on undisclosed factual accusations. We reach this conclusion both because of the emotional and angry tone of the letter, which does not imply reasoned debate, and also because its actual accusations are imprecise and difficult if not impossible to verify. For example, the statement that "Crown College is extremely racist, a growing campus view held by people of color and by enlightened faculty, staff, students and campus administrators" is incapable of demonstration, since terms such as "racist" or "enlightened" lack precise definitions. Also it is not possible to prove Vandenberg's status in the campus community with any precision. (Cf. this assessment of the accusations of low standing in the academic community leveled at Professor Ollman: "The

issue the dissents would have tried - the political science academic community's opinion of professor Ollman's stature as a political scientist - is inherently incapable of being adjudicated with any expectation of accuracy." [Conc. opn. of Bork, J., in *Ollman* v. *Evans, supra,* 750 F.2d at p. 1006.]) The characterization of Vandenberg's action as an attempt to "punish" young Filipino students is purely opinion, resting on the disclosed fact of his decision not to participate in the dinner. An "incredible level of bigotry" is imprecise and exaggerated. Vandenberg argues that the reference to affirmative action means that he impeded the University's affirmative action program, but if "affirmative action" is itself an exceptionally imprecise term which lacks uniform understanding.

We do not condone in any way the content and tone of the letter in question represents. But we observe that far worse has been found within the penumbra of First Amendment protection. (Some of the more pungent examples of "unfair, intemperate, scurrilous and irresponsible charges" which have received constitutional protection are detailed in Justice Gardner's classic decision in *Desert Sun Publishing Co.* v. *Superior Court* (1979) 97 Cal.App.3d 49, 51-52.) Restating, again, the test of constitutional protection - "whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion" (*Moyer* v. *Amador Valley J. Union High School Dist., supra,* 225 Cal.App.3d at p. 724) - we hold that this unreasonable, emotional and angry letter cannot reasonably be understood as implying any facts, that it is more opinion than fact, and as such is not appropriate for jury determination. Since it is also part of the rhetoric generated on an explosive topic of public concern, namely, racism on the college campus, an area entitled to constitutional protection, and since we do not think any reasonable reader would take it for a reasoned factual accusation, we conclude that is not an actionable defamation and that it is constitutionally protected expression. Defendants were therefore entitled to summary judgment in their favor.

DISPOSITION

Let a writ of mandate issue as prayed, directing the respondent court to vacate its order denying defendants' motion for summary judgment, and instead to make a new and different order granting the motion for summary judgment on the cause of action for defamation as to all defendants. Each party shall bear their own costs.

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Attorney for Plaintiff
DON VANDENBERG

Superior Court of the State of California for the County of Santa Cruz

DON VANDENBERG *Plaintiff,* v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, VICTOR KIMURA, ROBERT STEVENS, AND DOES 1-20, *Defendants.*	No. 111787 ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING SUMMARY ADJUDICATION RE PUBLIC OFFICIAL STATUS

The motion of defendants for an order granting summary judgment and/or summary adjudication of issues as to the plaintiff's first cause of action for libel was regularly heard on December 27, 1990. Thomas Gosselin appeared for defendant The Regents of the University of California; Jack W. Londen appeared for defendant Victor Kimura; and Alfred Lombardo appeared for the plaintiff.

After full consideration of moving and responding papers, all supporting papers, and oral arguments of counsel, the Court finds that plaintiff Don VanDenBerg

was a public official. However, the Court finds that a triable issue of fact exists as to whether the defendants acted with malice, and summary judgment shall therefore be denied.

The evidence submitted by the defendants supporting a negative inference on the issue of malice is that cited by the defendants in support of their undisputed statement of facts numbers 127-141, and cited on pages 7 through 9 of defendant Regents of the University of California in its reply memorandum in support of its motion for summary judgment, and cited by defendant Victor Kimura on pages 8 and 9 of his reply memorandum in support of his motion for summary judgment. The evidence submitted by the plaintiff supporting an affirmative inference on the issue of malice is that cited by the plaintiff in reply to statements 127-141 and cited on page 10 of the plaintiff's memorandum in opposition to defendants' motion.

IT IS ORDERED that defendants' motion for summary judgment is denied, except that summary adjudication is granted for defendants that plaintiff Don VanDenBerg is a public official.

Honorable Thomas A. Black

APPROVED AS TO FORM:

Date	Jack W. Londen
1/31/91	
Date	Thomas Gosselin

Sixth Appellate District No. H008154
S021839

In The Supreme Court
Of The State Of California
In Bank

VICTOR KIMURA Et Al., Petitioners

v.

SANTA CRUZ COUNTY SUPERIOR COURT, Respondent
DON VANDENBERG, Real Party In Interest

Real Party In Interest's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed May 30, 1991, which appears at 230 Cal.App.3d 1235. (Cal. Const., Art. VI, Section 14, rule 976, Cal Rules of Court.)

LUCAS
Chief Justice

December 12, 1988

BURSAR VAN DEN BERG
Crown College

Re: Pilipino College Night

Dear Don

I'm certain you've received your share of criticism for how Crown College rejected Pilipino College Night last Wednesday on the basis that it would be inappropriate to serve Asian food on December 7, the anniversary of the bombing of Pearl Harbor. Let me add my criticism.

As one of the few Asian administrators on campus, particular of Japanese descent, I have to say to you and Peggy that I am absolutely appalled and disgusted with your cancellation of Pilipino College Night. Your actions reinforce the view that Crown College is extremely racist, a growing campus view held by people of color and by enlightened faculty, staff, students, and campus administrators.

The very notion that you would attempt "to punish" our young Pilipino students for an unfortunate act of aggression which occurred 47 years ago by the Japanese government, demonstrates not only an incredible level of bigotry, but also a total ignorance of two of the most fundamental requirements of affirmative action: the need to recognize ethnic differences and the ability to not discriminate because of those differences.

Sadly, your unwillingness to recognize and even to admit a wrongdoing is the real tragedy. You and Peggy are perfect examples of what enlightened people of all ethnic and cultural backgrounds define as "racist" and "bigoted," and are at least responsible for severely impeding in a major way the campus' ability to mount a truly effective affirmative action program. The commitment to affirmative action starts at the top levels and institutions

and, unfortunately, for the faculty, staff, and students of Crown College, stops at the level of provost and bursar.

A white friend of mine visited Hiroshima recently. As she stood in front of a memorial which acknowledged the names of thousands of Japanese people who died as a result of the Atomic bomb dropped by the United States,

she was overcome by the devastation and carnage that took place, and was ashamed at what Americans had done over 40 years ago. As tears were streaming down her face, an elderly Japanese man walked up to her and said, "You're not responsible for what happened here, just as our Japanese children are not responsible for what happened at Pearl Harbor. We must learn to forgive and to forget."

Although I remember little of the internment camp I was born in, I recall the stories of how hard the years of relocation were on my parents. Following our return from a series of different internment camps, I remember as a young child having rocks thrown through the windows of our house and listening to racial slurs and personal threats. I remember listening helplessly as my grandmother, who was one of the people in Hiroshima at the time of the bomb, coughed herself to death from radiation poisoning. Her badly disfigured and burned body was a constant reminder to my family of the destructive capability of a nuclear bomb, so powerful that is has been used as a weapon only twice in history (by the United States against Japan's cities of Hiroshima and Nagasaki). The point here is that many people of all ethnic backgrounds and cultures have suffered.

I would prefer that you and Peggy not respond either in writing, by person, or by telephone. I'm afraid the racist rhetoric and perverted excuses you and Peggy have been spouting will only make me more angry and more upset.

Sincerely

Victor Kimura

cc: Assistant Chancellor Armstrong
Chair of the COP Isbister
Vice Chancellor Moore
Provost Musgrave
Admissions Counselor Ogimachi
Assistant Vice Chancellor Pacheco
Chancellor Stevens
Associate Director Walker
Asian and Pacific Island Student Association
City on the Hill Press
TWANAS

(2)

No. 91-828

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

DAN VANDENBERG,
Petitioner,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
and VICTOR KIMURA,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal for the State of California Sixth Appellate District

RESPONDENT VICTOR KIMURA'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The California Court of Appeal for the Sixth District issued a writ of mandate holding, under state law and under federal constitutional law, that a letter written by defendant Victor Kimura in the course of a heated university debate was not actionable defamation. The court of appeal concluded, in an unpublished decision, that no reasonable reader could take the criticisms in the letter for factual accusations and that the audience to which it was circulated could not reasonably believe that it implied or was based on undisclosed factual accusations. The federal questions presented are:

(1) Whether review is appropriate when the state appellate court decision was based on independent and adequate state grounds.

(2) Whether the court below applied the correct legal test when, relying on *Milkovich v. Lorain Journal Co.*, ___ U.S. ___, 110 S. Ct. 879 (1990), it held that Victor Kimura's December 12, 1988, letter was protected expression under the First Amendment of the Constitution, based on the conclusion that the letter implied no verifiable facts.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-828

DON VANDENBERG,

Petitioner,

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THE REGENTS OF THE UNIVERSITY OF CALIFORNIA and VICTOR KIMURA,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal for the State of California Sixth Appellate District

---

RESPONDENT VICTOR KIMURA'S BRIEF IN OPPOSITION

OPINIONS BELOW

The decision of the California Supreme Court denying review and ordering decertification and withdrawal from publication of the court of appeal decision is dated August 22, 1991, and is not reported.

The opinion of the California Court of Appeal for the Sixth District is dated May 30, 1991, and has been withdrawn from publication.

The order of the Superior Court of the County of Santa Cruz denying summary judgment, dated February 13, 1991, is not reported.

The order of the Superior Court of the County of Santa Cruz granting summary judgment, dated October 8, 1991, is not reported.

The decision of the California Supreme Court, the opinion of the California court of appeal, and the order of the superior court denying summary judgment are reprinted in Petitioner VanDenBerg's appendix.

STATEMENT OF THE CASE

Victor Kimura participated in a debate within the University of California, Santa Cruz ("UCSC" or the "University") community about an official decision by the administration of one of UCSC's colleges. Kimura was one of many who believed that a well-publicized decision by Crown College raised serious issues about racial insensitivity at UCSC, and he challenged the decision in an emotional open letter to Plaintiff VanDenBerg, the administrative head of the College. VanDenBerg responded not by answering any of the criticisms, but by suing one of his critics for libel.

I. Factual Background

The claims against Kimura in this action were based on a single letter that he wrote to comment on a controversy on the

campus and in the University community.[1] Plaintiff VanDenBerg was the Bursar, or chief administrative officer, of Crown College, the largest of the colleges that make up the University. (Pet. App. A-4; Defendants' Joint Separate Statement of Issues as to Which There is No Substantial Controversy, Associated Facts and Reference to Supporting Evidence ("Undisp. Facts") Nos. 53-56; Deposition of Don VanDenBerg ("VDB Dep.") 34:1-2; 12:6-8.)[2] Kimura was employed at the University as Budget Director. (Pet. App. A-4.) On December 7, 1988, Crown College refused to participate in a "College Night" celebrating Filipino culture. (Pet. App. A-4 to A-5.) Crown's staff decided, with Plaintiff's approval, that Crown would reject any kind of "Asian" theme or menu because December 7 is the anniversary of the Japanese attack on Pearl Harbor on December 7, 1941. (Undisp. Facts Nos. 12-17.) Plaintiff, as bursar, was responsible for planning and supervising all of Crown's public events, including "College Nights," regular cultural events held on the first Wednesday of each month during the academic term. (Pet. App. A-5;

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[1] Plaintiff VanDenBerg's purported "Factual Background" makes no citations to the record and contains statements that are outside everything in the trial court record and contrary to the court of appeal's "state[ment of] the record in accordance with the principles governing motions for summary judgment, which are that the evidence is viewed in the light most favorable to the party resisting the motion, with all inferences made and ambiguities resolved in his favor." (*See* Petitioner's Appendix (hereinafter "Pet. App.") A-4 to A-6.) Plaintiff did not challenge the court of appeal's statement of the record in a petition to the court of appeal or to the California Supreme Court. Nor does plaintiff purport to ask this Court to second-guess the court of appeal's statement of the record.

[2] All of the "Undisputed Facts" cited in this opposition to the petition for certiorari were conceded by plaintiff VanDenBerg as undisputed in Plaintiff's Response to Defendants' Joint Statement of Undisputed Facts.

Undisp. Facts Nos. 6, 60-61; Deposition of Morgan W. Snow 33:3-4.)

Following the refusal of Crown College to participate in the Filipino event, a large number of students, staff, and faculty expressed public concern about the racial implications of Crown College's decision to reject the Filipino theme because of the Pearl Harbor anniversary. (Pet. App. A-5; VDB Dep. Exhs. 10, 12, 29, 31, 35, 37, 52, 59.) Articles and posters appeared condemning the decision as "bigoted" and "insensitive." (VDB Dep. Exhs. 3, 10, 12.) Meetings were held in which Asian students expressed their belief that they were being "punished" by Crown College, based on association of Asian ethnic groups with the Japanese attack on Pearl Harbor. (Deposition of Shawn Ogimachi at 21:2-8; 25:19-26:10; Deposition of John W. Isbister at 84:18-85:1.)

UCSC Budget Director Victor Kimura, a Japanese American who was born in an American internment camp during World War II, was deeply offended by the actions of administrators at Crown College, including Bursar VanDenBerg. In the course of the heated University debate about the College Night decision, Kimura drafted an open letter to VanDenBerg criticizing Crown's decision. In the letter, dated December 12, 1988, Kimura expressed his belief that the rejection of a Filipino theme by Crown wrongly implicated Filipino and other Asian-American students in the Pearl Harbor attack. Kimura attempted to "add [his] criticism" to the ongoing debate, describing the Crown administrators who cancelled the Filipino event as "perfect examples of what enlightened people of all ethnic and cultural backgrounds define as 'racist' and 'bigoted.'" (Pet. App. A-23.)

On December 21, 1988, the Chancellor of UCSC issued a statement criticizing Crown's decision as an "error of judgment." (Pet App. A-5.) An official report of the decision

by Vice Chancellor Bruce Moore concluded that Crown's administrators showed "'insensitivity' and [were] oblivious to the fact that many outside the University would view the linkage between Asian Food and World War II as institutional racism." (Pet. App. A-5 to A-6.) VanDenBerg took a leave of absence from the University and brought this action for money damages against the University Regents, Chancellor Stevens, and Kimura.

II. Procedural History

Kimura and the Regents of the University of California moved for summary judgment on November 27, 1990, on the grounds that the December 12, 1988, letter is not actionable defamation under state law, that it is protected expression under *Milkovich v. Lorain Journal Co.*, ___ U.S. ___, 110 S. Ct. 2695 (1990), and that Bursar VanDenBerg is a public official or public figure and cannot show by clear and convincing evidence that Kimura acted with actual malice, under *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964). The superior court granted summary adjudication on the public official issue, holding that Bursar VanDenBerg is a public official, but denied summary judgment on all other grounds. (Pet. App. A-20 to A-21.)

Kimura, joined by the Regents of the University of California, petitioned for a stay and a writ of mandate on March 4, 1991. The petition was granted on May 30, 1991. The decision by the court of appeal began by expressly distinguishing between the state law issue of whether a cause of action had been stated for defamation and the federal question of whether Kimura's speech was protected by the First Amendment. *See infra* Reasons Why The Petition Should Be Denied, at I. The court then ruled in Defendents' favor on *both* grounds. First the court held, as a matter of state law, that the letter did not allege or imply defamatory facts. (Pet. App.

A-6, A-18.) Second, and independently, the court held that the letter was protected expression under this Court's decision in *Milkovich*, stating that the governing test is "whether particular statements can reasonably be interpreted as stating actual defamatory facts about an individual." (Pet. App. A-8, A-18.) Specifically, the court found that the issues raised in the December 12, 1988, letter were "clearly matter of public concern." (Pet. App. A-11.) The court held that the audience to which the letter was addressed and circulated "would not reasonably believe that it implied or was based on undisclosed factual accusations." (Pet. App. A-17.) The court also emphasized that the criticisms stated in the letter were "imprecise and difficult if not impossible to verify" and "part of the rhetoric generated on an explosive topic of public concern." (Pet. App. A-18.)[3]

The court then determined that no reasonable reader would understand Kimura's letter as a factual accusation and, based on this determination, held that the letter was not actionable under California law or federal constitutional law: "We conclude that it is not an actionable defamation and that it is constitutionally protected expression." (Pet. App. A-18.) Accordingly, the court issued a writ of mandate directing the superior court to grant summary judgment for Defendants on the cause of action for defamation.

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[3] On the ground of mootness, the court of appeal did not reach the issues raised in the petition for writ of mandate concerning Bursar VanDenBerg's public official status and whether he could, as a matter of law, prove actual malice by clear and convincing evidence. (Pet. App. A-3.) The court of appeal ordered the decision that Bursar VanDenBerg is a public official vacated based on a change in California procedural law subsequent to the hearing on the motion, which precludes summary adjudication of issues that do not completely dispose of an action or defense. (Pet. App. A-3.)

The California Supreme Court denied review of the decision, and ordered that it be decertified, on August 22, 1991.[4] On October 8, 1991, the superior court issued an order granting summary judgment on the defamation claim.

REASONS WHY THE PETITION SHOULD BE DENIED

Review by this Court is reserved for those few cases in which it is necessary to secure uniformity of decision or to settle an important question of federal or constitutional law. Rules of the Supreme Court, Rule 17. This case does not warrant review on either ground.

First, the California court of appeal decided this case on independent and adequate state law grounds, as well as under the First Amendment. Certiorari is therefore not warranted.

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[4] Cal. Rules of Court, Rule 976(c)(2) (1991) (providing that an opinion certified for publication by a court of appeal shall not be published on an order of the California Supreme Court to that effect). The consequence of "depublication" is that the decision may not be used as precedent in any other action, although it remains law of the case. Rule 977(a) ("An opinion that is not ordered published *shall not be cited or relied on by a court or a party in any other action or proceeding . . .*") (emphasis added); Rule 977(b) (stating exception for doctrines of law of the case, *res judicata*, or collateral estoppel). An order by the California Supreme Court ordering depublication of an opinion "shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion." Rule 979(e); *see also* Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal. L. Rev. 514 (1984).

California v. Freeman, 488 U.S. 1311, 109 S. Ct. 854 (1988).[5] Second, the court of appeal properly decided this case under the First Amendment, applying this Court's recent decision in *Milkovich* to the undisputed facts of the case. Plaintiff can point to no conflict in decisional law and no unresolved questions of constitutional law raised by this case. Consequently, certiorari is inappropriate and should be denied. Third, the decision of the court of appeal in this depublished case applies uniquely and exclusively to these parties. The decision does not appear in the official reporter, and may not be cited as precedent in any other California action. For this reason, too, it does not merit review by this Court.

I. The Court of Appeal Decided This Case on Independent and Adequate State Law Grounds

The California Court of Appeal for the Sixth District expressly states that its decision is based on separate and independent state common law grounds, as well as on the First Amendment. The court identifies two separate "analytic tasks" that it must undertake in determining whether the Kimura letter constitutes actionable defamation: (1) deciding whether the statement is sufficiently factual to be actionable, a state law determination; and (2) deciding whether it is worthy of constitutional protection. The court proceeds to accomplish both of these tasks, deciding first of all that the letter is not actionable on state law grounds.

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[5] Plaintiff's lead argument, that certiorari should be granted because the court of appeal followed federal constitutional law rather than "standing on [its] own ground," *i.e.*, following state law, is therefore meritless on its face. As shown below, the court of appeal held that the letter was not actionable defamation under state tort law as well as under federal constitutional requirements. (Pet. App. A-18); *see* discussion *infra* at I.

The opinion stresses at the outset that "the constitutional question cannot arise until it is first determined that a statement is an actionable defamation under state law." (Pet. App. A-6.) The court articulates state law as requiring that "no communication gives rise to an action for defamation unless it either alleges or implies defamatory facts." (Pet. App. A-6.) The court cites *Stevens v. Tillman*, 855 F.2d 394, 400 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065, 109 S. Ct. 1339 (1989), which held under Illinois common law that the action of calling an elementary school principal "racist" was not defamatory. *Id.* at 402. The court also cites the Restatement (Second) of Torts, Section 566 (1977), for the common law rule that a "statement in the form of an opinion . . . is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." (Pet. App. A-6. n.2.)

Although, as discussed below, the court also correctly holds that the statements in Kimura's letter are protected expression under the First Amendment, the holding of the court is equally premised on independent and adequate state law grounds. The court makes this clear when it states of the letter, "we conclude that it is not an actionable defamation *and* that it is constitutionally protected expression." (Pet. App. A-18) (emphasis added). Where a state appellate court decision is firmly grounded in state law, review is inappropriate. Thus, in *California v. Freeman*, 488 U.S. 1311, 1313, 109 S. Ct. 854, 856 (1988) (O'Connor, J., in chambers) a stay was denied where it appeared clear from the face of the California Supreme Court opinion that its analysis "constitutes an adequate and independent state ground of decision." Similarly, the decision in *Uhler v. AFL-CIO*, 468 U.S. 1310, 1311, 105 S. Ct. 5, 6 (1984) (Rehnquist, J., in chambers), stresses that the rule against reviewing state court decisions that rest on independent alternative state grounds was adopted "largely for the reason that decisions on the federal questions . . . would amount to no more than advisory opinions."

Because the court of appeal bases its holding in this case on an independent and adequate state law ground, certiorari is not appropriate.

II. The Court of Appeal's Decision Correctly Applied Clear Precedent to Undisputed Facts and Does Not Merit Review

Recognizing that the leading precedent on the constitutional question is *Milkovich*, the California Court of Appeal for the Sixth District faithfully followed this Court's analysis in that decision. *Milkovich v. Lorain Journal Co.*, ___ U.S. ___, 110 S. Ct. 2695, 2707 (1990). Thus, there is no unsettled legal issue raised by this petition. At most, Plaintiff is dissatisfied with the court of appeal's application of *Milkovich* to the undisputed facts of the case. However, the way in which an appellate court applies this Court's precedents to particular facts is not an appropriate subject for review.

Applying *Milkovich*, the court of appeal properly held that the "dispositive question" under the First Amendment in a defamation action is "whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion." (Pet. App. A-9) (citing *Milkovich*, 110 S. Ct. at 2707). The court of appeal recognized that its task "requires accommodating the protection of free expression of ideas under the First Amendment with the common law protection afforded to an individual's reputation." (Pet. App. A-6.) The court of appeal properly concluded that a balance of those interests in this case required that Kimura's letter be entitled to full constitutional protection under *Milkovich*. (Pet. App. A-6.) *See Milkovich*, 110 S. Ct. at 2706.

As the court of appeal emphasized, First Amendment protection rests, under *Milkovich*, not on any artificial

dichotomy between "opinion" and "fact," but on a court's careful analysis, under the totality of the circumstances, of "whether particular statements can reasonably be interpreted as stating actual defamatory facts about an individual." (Pet. App. A-8.) In *Milkovich*, as an example of speech that would not be actionable, the Court referred to a statement about "'abysmal ignorance [in] accepting the teachings of Marx and Lenin.'" *Milkovich*, 110 S. Ct. at 2706. Like that statement, Kimura's references to "what enlightened people of all ethnic and cultural backgrounds define as 'racist' and 'bigoted'" and to "truly effective affirmative action," and his use of the word "punish" in quotation marks, underscore the subjective, rhetorical and nonverifiable nature of his criticisms.

California cases cited by the court of appeal, which plaintiff now questions, either applied *Milkovich* directly or were characterized as consistent with this Court's decision in *Milkovich*. Thus, for example, *Moyer v. Amador Valley Joint Union High Sch. Dist.*, 225 Cal. App. 3d 720, 724-26, 275 Cal. Rptr. 494, 496-98 (1990), expressly applied *Milkovich* to the facts in the case and concluded that a student's accusation that his teacher was a "babbler" was nonactionable. Similarly, *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 260, 721 P.2d 87, 90, 228 Cal. Rptr. 206, 209 (1986), *cert. denied*, 479 U.S. 1032, 107 S. Ct. 880 (1987), applied a "totality of the circumstances" test, consistent with *Milkovich*, for determining what is defamatory and what is rhetorical hyperbole. Indeed, the California Supreme Court's decision in *Baker* was recently cited with approval by this Court in *Masson v. New Yorker Magazine, Inc.*, ___ U.S. ___, 111 S. Ct. 2419, 2430 (1991).

The court of appeal stressed the undisputed fact that Kimura's letter was written in the context of a heated University-wide debate over the moral and political implications of the refusal by plaintiff, the highest staff official at Crown College, to permit a planned celebration of Filipino

culture on December 7, 1988, because of the Pearl Harbor anniversary. (Pet. App. A-4 to A-6.) The court of appeal correctly held that discussion of important public issues, like the one presented by plaintiff's decision, "implicates constitutional values." (Pet. App. A-12.) This is particularly true, as the court below noted, in a university setting, "in which the need for free discussion and airing of matters of concern is great." (Pet. App. A-11.) Thus, the court of appeal cited the California Supreme Court's decision in *White v. Davis*, 13 Cal. 3d 757, 770, 533 P.2d 222, 231, 120 Cal. Rptr. 94, 103 (1975), which refers to the university campus as "the sacred ground of free discussion." (Pet. App. A-11.)

As the court of appeal also held, Kimura's letter was nonactionable because "the audience to which it was addressed and circulated would not reasonably believe that it implied or was based on undisclosed factual accusations."[6] (Pet. App. A-17.) The court of appeal based its conclusion on the impossibility of verifying the "imprecise and exaggerated" opinions expressed about plaintiff, as well as "the emotional

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[6] The court of appeal also rejected Plaintiff's attempt to analogize his case to *Slaughter v. Friedman*, 32 Cal. 3d 149, 185 Cal. Rptr. 244, 649 P.2d 886 (1982), cited in his petition to this Court at 13 and 14 n.8. As the court of appeal stressed, Plaintiff's reliance on that case was misplaced: "[*Slaughter*] resolved as a matter of law whether the allegedly libelous statements could be understood by the average reader in either sense (as fact or opinion) and found a jury trial appropriate when the court had decided that the statement was indeed susceptible of either of those reasonable interpretations." (Pet. App. A-10 to A-11.) There is no such ambiguity in the present case, where the alleged libel "cannot reasonably be understood as implying any facts." (Pet. App. A-18.) Moreover, unlike the official-sounding letter in *Slaughter*, which "eschewed literary flair and rhetorical device" (*Baker*, 42 Cal. 3d at 267), Kimura's letter was highly rhetorical, relied not on official criteria but on personal anecdotes, and was written as an open letter in the course of an ongoing public debate.

and angry tone of the letter." (Pet. App. A-17.) The decision of the court of appeal is fully consistent with this Court's holding in *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284-86, 94 S. Ct. 2770, 2781-82 (1974), that the use of the word "traitor" was not actionable because it was "merely rhetorical hyperbole." Likewise, the decision complies with *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 14, 90 S. Ct. 1537, 1542 (1970), holding that an accusation of "blackmail" was not defamatory because it was "no more than rhetorical hyperbole." The decision is also consistent with *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558 (1986), because the December 12, 1988, letter involves a statement about an issue of public concern and is not susceptible to proof as either true or false.[7] Kimura's letter also

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[7] The court of appeal cited numerous cases in support of its conclusion that terms like "racist," "bigoted," "affirmative action," and "punish" as used in Kimura's letter were too imprecise and variable in meaning to constitute actionable speech under *Milkovich*. (*See* Pet. App. A-12 to A-17, citing, *inter alia*, *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065, 109 S. Ct. 1339 (1989) ("Accusations of 'racism' no longer are obviously and naturally harmful.' The word has been watered down by overuse, becoming common coin in political discourse"); *Sall v. Barber*, 782 P.2d 1216, 1218-19 (Colo. App. 1989) (the charge "bigot," in context, was mere rhetoric); *Scelfo v. Rutgers Univ.*, 116 N.J. Super. 403, 282 A.2d 445, 449 (1971) (stressing that the epithet "Racist Pig Bastards" would not suggest to the average reader in the university community that the police were remiss in their duty, but that the author was angry, upset and resentful toward the police); *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976) (the accusations "fascist" and "fellow traveler" were too imprecise in meaning to be defamatory), *cert. denied*, 429 U.S. 1062, 97 S. Ct. 785 (1977).) Moreover, every case that has considered terms like "racist," "bigoted," and "fascist" under the "verifiability" test required under *Milkovich* has held such accusations to be nonactionable as a matter of law, because "there

Footnote Continues ...

merits constitutional protection as part of our

> profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710, 721 (1964).

Based on a full and careful analysis, the court of appeal concluded that Kimura's letter constituted speech protected under the First Amendment. The court of appeal decision expressly followed and correctly applied this Court's decision in *Milkovich* to the undisputed facts about the content and context of Kimura's letter. Consequently, the petition should be denied.

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are no objective criteria by which the truth or falsity of these statements can be evaluated." *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1572 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242, 106 S. Ct. 2505 (1986); *Carto v. Buckley*, 649 F. Supp. 502, 507-10 (S.D.N.Y. 1986) (holding the accusation of "racial and religious bigotry" nonactionable); *Liberty Lobby, Inc. v. National Review*, No. 79-3445, slip op. at 10 (D.D.C. April 20, 1983) (holding the charge of "anti-Semitism" nonactionable); *Liberty Lobby, Inc. v. Dow Jones & Co.*, 638 F. Supp. 1149, 1152 (D.D.C. 1986) (noting that the term "anti-Semitic" is "probably constitutionally protected opinion"), *aff'd*, 838 F.2d 1287 (D.C. Cir.), *cert. denied*, 488 U.S. 825, 109 S. Ct. 75 (1988); *Holy Spirit Ass'n for the Unification of World Christianity v. Sequoia Elsevier Publishing Co.*, 75 A.D.2d 523, 524, 426 N.Y.S.2d 759, 760 (1980) (holding the phrase "Nazi-style anti-semitism" nonactionable); *Raible v. Newsweek, Inc.*, 341 F. Supp. 804, 807 (W.D. Pa. 1972) (stressing that to call a person a bigot or other name descriptive of his racial, political, religious, economic, or sociological philosophies does not give rise to a libel action).

III. Certiorari Should Be Denied Because the Decision Is Unpublished and the Holding Affects Only the Parties

Finally, the California Court of Appeals for the Sixth District's opinion is not a published decision, will not appear in the official reporter, and cannot be cited or relied on as precedent in any future California case. Cal. Rules of Court, Rule 976(c)(2), discussed *supra* at n.4. The decision will therefore affect only the parties to this action. For this reason alone, this case does not merit a grant of certiorari. As the Court stressed in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79, 75 S. Ct. 614, 619 (1954), on dismissing a writ of certiorari as improvidently granted,

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties.

(quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423 (1923)). For this reason as well, the petition should be denied.

CONCLUSION

Because the California Court of Appeals for the Sixth District's unpublished decision does not raise an important legal question and does not depart from existing uniformity in state law on the subject, there is no basis for review. Indeed, review would be improper because the decision was based on independent and adequate state grounds. For these reasons, the petition for writ of certiorari should be denied.

Dated: December 18, 1991

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